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In the Supreme Court of the United States

October Term, 1941.

No. 742.

AXEL HAWKINSON, *Petitioner and Appellant Below,*

vs.

GEORGE GASTON JOHNSTON, *Respondent and Appellee Below.*

GEORGE GASTON JOHNSTON, *Respondent and Appellant Below,*

vs.

AXEL HAWKINSON, *Petitioner and Appellee Below.*

OPPOSING BRIEF OF GEORGE GASTON JOHNSTON TO PETITION FOR WRIT OF CERTIORARI.

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The basis of the petition for writ of certiorari is that the decision of the Circuit Court of Appeals and the judgment of the District Court denied equal protection of the laws in a diversity of citizenship case in that the principles of Missouri landlord and tenant law and the state's declared social and economic policy on important

questions of local law were set aside, in direct conflict with controlling decisions of the Missouri Supreme Court on the same matters.

This complaint possibly comes under Sec. 5(b) of Rule 38 of this Court, and none other. Such rule provides:

> "Where a circuit court of appeals has * * * decided an important question of local law in a way possibly in conflict with applicable local decisions * * *."

The Court of Appeals had the determination of the local law very much in mind in considering its decision, as evidenced by the opinion of the Court. It states (Trans. 101):

> "Two principal questions are presented for determination: (1) Whether a repudiation of a lease and an abandonment of the premises accompanied by a default in the payment of an installment of rent may constitute a total breach of contract of lease under the law of Missouri."

The second question appertains only to the matter of damages.

And again the Court said (Trans. 103):

> "The first and principal question is whether under the law of Missouri, a repudiation of a lease and an abandonment of the premises, accompanied by a refusal to pay an accrued installment of rent, can constitute a total breach of the contract of lease. The courts of Missouri do not appear to have passed upon the precise point. The general doctrine of anticipatory breach by repudiation has, however, been clearly recognized in that state. [Citing five Missouri cases and the Restatement of the Law of Contracts, Mo. Ann.] A majority of the courts in this country that have passed upon the question have applied the doctrine of total breach to an anticipatory repudiation or

> other unjustified refusal to perform some material, permeating provision of a contract of lease [referring to 13 states and probably Iowa, Minnesota and Oregon], and the trial court held that, since there was nothing contrary to such a view in the expressions of the Missouri courts on the subject of anticipatory repudiation, it was proper to assume that Missouri would follow the general law."

Then having analyzed the Missouri cases and referring to the Restatement, the Court of Appeals finds (Trans. 107):

> "We hold that, within the conditions and qualifications of the rule applied to general contracts under the Missouri decisions, the doctrine of total breach by anticipatory repudiation is applicable to contracts of lease in that state. This is sufficient to sustain plaintiff's right to sue in the present case."

With the Missouri authorities recognizing the applicability of anticipatory breach to cases involving ordinary contracts and certain covenants in leases, and the weight of authority in other states, recognizing the applicability of the doctrine, the Court of Appeals had aught else to do but to apply the doctrine to this instance of breach and repudiation of a lease contract. Instead of being the subject of criticism for so doing, the Court of Appeals would be the subject of criticism had it not done so.

Petitioner is quite mistaken (Petitioner's Brief 22) when he says: "That doctrine (anticipatory breach) has three times been expressly denied for 99-year leases by the Missouri Supreme Court *en banc* • • •." The petitioner cannot make it true by mere assertion. Counsel for Johnston searching diligently could find no such cases. The District Court could find none. The Court of Appeals could find none, and so states in its opinion (Trans. 103).

But let us go further and analyze the cases which petitioner cites in support of his assertion (Petitioner's Brief 22). Each of these cases, save one, is a case in which the lessor declared a forfeiture and took possesion of the property, electing to have possession, rather than personal right of action against the lessee. Lest there be any question that this is correct, let us quote briefly from these cases.

In *Blond* v. *Hoffman,* 343 Mo. 247, 121 S. W. (2d) 137, the Supreme Court of Missouri, sitting *en banc,* said:

> "Plaintiffs took affirmative action in declaring the lease forfeited. They took absolute possession of the property and notified Hoffman that he had no rights on the premises. Plaintiffs took their choice of ending the relationship of lessor and lessee. Such action, whether considered as an acceptance or an abandonment of the lease by the lessee, or an absolute forfeiture by the lessor, accompanied with taking of possession, discharged Hoffman and his surety from the covenants which were not breached, and which were to be performed in the future."

In *Blond* v. *U. S. F. & G. Co.,* 336 Mo. 684, 80 S. W. (2d) 675, 677, the Court said:

> "Appellant and also respondents have cited the cases of *Blanke Bro. Realty Co.* v. *American Surety Co.,* 297 Mo. 41, 247 S. W. 797 (court *en banc*), and *Sharon* v. *American Fidelity Co.,* 172 Mo. App. 309, 157 S. W. 972, as supporting their respective contentions. From a reading of the two cases and the authorities cited in the course of the opinions, it will be noted that it is well settled law that a forfeiture of a lease by the lessor and his taking possession of the leased premises without any reservations in favor of the lessee terminates absolutely the relation of lessor

and lessee and discharges all the obligations of the lessee, not breached, which were to be performed after the date of taking possession."

In the case of *Blanke Bros. Realty Co.* v. *American Surety Co.,* 297 Mo. 41, 247 S. W. 797, 798, it appears:

"On July 30, 1914, the Blanke Co. served notice of forfeiture of said lease upon the Marsix Co."

In *Sharon* v. *American Fidelity Company,* 157 S. W. 972, 172 Mo. App. 309, it appears:

"Plaintiff (lessor) then about six months before the two years limited for the first improvements had expired took possession of the property * * *."

The only case which differs from these cases of declared forfeiture and resumption of possession on the part of the lessor is *Von Schleinitz* v. *North Hotel Co.,* 323 Mo. 1110, 23 S. W. (2d) 64. It is there said:

"We have searched the record herein in vain for any evidence however slight tending to show that the plaintiff, Von Schleinitz, or any agent on his behalf, protested to the tenant and lessee, North Hotel Company, against the abandonment and surrender of the leased premises, or that plaintiff, Von Schleinitz, informed the tenant, North Hotel Company, or any representative or agent thereof, that plaintiff resumed possession of the leased premises for the benefit and account of the North Hotel Company, and would look to such corporate tenant for the payment of any loss or deficiency of the stipulated rents."

Hence it is apparent in such case that there was no protest made by the lessor and no affirmative action taken by the lessor. The lessor's inaction and failure

to state his position, together with his resumption of possession without reservation, was held in law to constitute acquiescence to the surrender. Lessor Johnston in the instant case never acquiesced, and never accepted surrender, as we will show by quotation from the decision of the Court of Appeals.

None of these authorities control or affect the decision in the instant case. Here the lessee repudiated the lease, walked out and abandoned the premises, over the warnings and repeated protests of the lessor. That the lessor did not accept the lessee's repudiation of the lease plainly appears in the last paragraph of the opinion, which states (Trans. 112):

> "Defendant further argues that plaintiff's actions in the situation amounted to an acceptance of surrender, and so precluded a suit for repudiation. We find nothing in the evidence that compels or merits this construction. Plaintiff, from the start, had notified the lessees that he would not accept a surrender, and had advised them in effect that their inexcusable attempt to abandon the premises and their unjustifiable refusal further to perform the obligations of the lease would be regarded as a repudiation. He had informed defendant, after the abandonment, that he would be willing to work out some arrangement to lease the premises in order to minimize the damages, but that 'any such arrangement will, of course, be with full reservation of his rights against you.' Such an arrangement was finally agreed upon, for a leasing of the premises to a third party, 'without waiver of the respective rights of the parties.' There is nothing in any of these actions, or in the institution of a suit for damages ir harmony with them, that must or can be held to have consummated a surrender, as a matter of necessary legal implication. Plaintiff's whole course, on the contrary, was a studied effort to preserve his legal rights on the contract, and to avoid any act that could be declared to be inconsistent with them."

Passing to petitioner's fourth ground for granting the writ (Petitioner's Brief 31), that the courts below refused to declare and apply the Missouri law of waiver, etc., a statement of the facts, upon which the alleged waiver is based, from the opinion of the Court of Appeals, should be enough to dispose of this contention. The Court of Appeals said (Trans. 111):

> "Defendant has argued a number of other contentions, with which we are unable to agree, and which require only a brief discussion. Thus, he contends that his abandonment of the property and his refusal to continue performance of the lease were not an actionable repudiation, but a justifiable surrender. The argument seeks to ground itself on a covenant in the lease, which required the lessees to erect a building upon the property within five years from the commencement of the term, and which further provided that 'after the new building shall have been constructed, the personal liability of the lessees hereunder may be terminated by lessees having complied with all the terms and conditions of this lease which at that time lessees shall have agreed to perform, and by the lessees surrendering to the lessor the premises, and improvements thereon and the possession thereof.' The building was never erected, but plaintiff failed to bring an action upon the covenant until the statute of limitations had run against the obligation. When he attempted to sue, the court dismissed his action on the ground that it was barred by the statute of limitations.
>
> "Defendant argues that this left the situation the same as if the building had actually been erected, and entitled him to make a surrender accordingly. But it would indeed be the sheerest legal fiction to assert that the effect of the statute of limitations was to perform the lessees' obligation to erect a building."

In other words, petitioner had maintained in the Court of Appeals that a bar by limitation or alleged waiver stands for, or is the equivalent of, physical being; that this fiction of law is a substitute for the steel, brick and mortar out of which the building was to have been constructed. This specious theory was denied by the District Court and the Court of Appeals.

The applicability of the doctrine of anticipatory breach to real estate leases is no stranger to this Court. *Palmer* v. *Conn. Railway and Lighting Co.*, 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 283. Its application is a question of local law. *Gardiner* v. *William S. Butler and Co.*, 246 U. S. 303; *Moore* v. *McDuffie*, 71 Fed. (2d) 729. Absent any decision of the State Court on the question, it is the province of the Federal Court to determine the law of the state, and in so doing, take into consideration the rules in other jurisdictions and any decision of the state court concerning matters of a relevant nature. *Schwager* v. *Schwager*, 109 Fed. (2d) 754. This the Court of Appeals did, and properly so, basing its decision to come within the intendment of the declared local law, as evidenced by the opinion (Trans. 103, Note 2) and the general law (Trans. 103, Note 3).

The petition is based upon matters not in accord with the deliberate consideration and findings of the Court of Appeals. As illustrated, there is no conflict with local law. Hence we submit that the petition is without substantial merit and should be denied.

Respectfully submitted,

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